

WEST VIRGINIA SUPREME COURT OF APPEALS

No. 33102

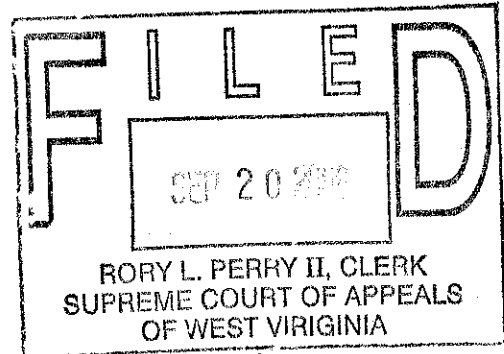
JOHN BARBINA, individually  
and as parent of ANISSA BARBINA,  
an infant,

Appellants,

vs .

CHARLES CURRY,  
KELLEY A. CURRY,  
THE WEST VIRGINIA DEPARTMENT  
OF HEALTH AND HUMAN RESOURCES,  
LORI GLOVER, CLARK SINCLAIR, as  
Sheriff of Taylor County, West Virginia, and  
VALLEY COMPREHENSIVE COMMUNITY  
MENTAL HEALTH CENTER, INC.,

Respondents.



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APPEAL FROM  
THE CIRCUIT COURT OF  
TAYLOR COUNTY, WEST VIRGINIA

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REPLY BRIEF OF APPELLANTS TO VALLEY

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THE KIND OF PROCEEDING AND NATURE OF THE  
RULING IN THE LOWER TRIBUNAL

This is an Appeal of an Order entered on the 20<sup>th</sup> day of September, 2005, by the Circuit Court of Taylor County, West Virginia, that awarding summary judgments to Lori Glover, Clark Sinclair, the now former Sheriff of Taylor County, West Virginia, the West Virginia Department of Health and Human Resources (hereinafter referred to as "the WVDHHR"), and Valley Comprehensive Community Mental Health Center, Inc., (hereinafter referred to as "Valley").

STATEMENTS OF FACTS

Appellants do not disagree with the facts Valley set forth in their statement of factual background. Though the trial court found for purposes of the summary that Valley had reported the abuse of Anissa Barbina to the WVDHHR on September 18, 1998, this alleged fact is disputed by the WVDHHR.

THE ASSIGNMENTS OF ERROR RELIED UPON  
ON APPEAL AND THE MANNER IN WHICH THEY  
WERE DECIDED IN LOWER TRIBUNAL

1. The trial court erred in granting Clark Sinclair, the now former Sheriff of Taylor County, West Virginia, a summary judgment;
2. The trial court erred in granting the WVDHHR a summary judgment; and
3. The trial court erred in granting Valley a summary judgment

Each of these rulings was adverse to the appellants. Appellants objected to the trial court's rulings.

POINTS AND AUTHORITIES RELIED UPON

## CONSTITUTIONS:

5<sup>th</sup> Amendment to the United States Constitution

14<sup>th</sup> Amendment to the United States Constitution

Article 3, § 10, of the West Virginia Constitution

## STATUTES:

West Virginia Code, § 49-5D-2

West Virginia Code, § 49-6A-1

West Virginia Code, § 49-6A-2

West Virginia Code, § 49-6A-8

West Virginia Code, § 49-6A-10

## CASES:

*Arbaugh v. Board of Education*, 214 W.Va. 677, 591 S.E.2d 235 (W.Va. 2003)

*Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979)

*Brandon Lee, In Re*: H.S. 32872 (030106 Berkeley County)

*Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978)

## SECONDARY:

“Court’s Charge and Instructions, Civil Cases”, 1.14,

<http://www.state.wv.us/wvsca/jury/civilchg.htm>

## DISCUSSION OF LAW

A. There is evidence that Valley was negligent, which proximately caused damages

*Arbaugh v. Board of Education*, 214 W.Va. 677, 591 S.E.2d 235, 241-242 (W.Va. 2003),

stated:

In so holding, we have not ignored Mr. Arbaugh's plea to carve out a private cause of action for more egregious situations, such as where an eye-witness has failed to report. Despite the underlying merit to this request, we are bound to refrain from making such policy determinations since " [i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]" *State v. Richards*, 206 W.Va. 573, 577, 526 S.E.2d 539, 543 (1999), quoting *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted). We note that children harmed by such egregious circumstances are not without remedy, where in an otherwise proper case a cause of action may be brought based on negligence with the failure to report admissible as evidence in that context.

The amended complaint (filed in May of 2002) and the second amended complaint alleged in applicable part as to Valley:

10. On or about September 18, 1998, Helen Lough and/or other persons employed by Valley Comprehensive Community Mental Health Center, Inc., either made or negligently failed to make a referral to Child Protective Services of the West Virginia Department of Health and Human Resources that Anissa Barbina was being sexually assaulted and/or abused by Charles Curry as required by law and C. Perrone accepted the referral.

12. Because of the negligence of the West Virginia Department of Health and Human Resources and/or Valley Comprehensive Community Mental Health Center, Inc., nothing was done by the West Virginia Department of Health and Human Resources from September 18, 1998, until February of 2000 regarding Anissa Barbina having been sexually assaulted and/or abused by Charles Curry until John Barbina made a referral.

14. As a result of the negligence of the West Virginia Department of Health and Human Resources and/or as a result of the negligence of Valley Comprehensive Community Mental Health Center, Inc., no investigation was conducted by Child Protective Services of the West Virginia Department of Health and Human Resources and/or no report was filed pursuant to W.Va. Code, § 49-6A-9, by Child Protective Services of the West Virginia Department of Health and Human Resources with a local police agency from September 17, 1998, to at least February 7, 2000.

Appellants do not claim that Valley did anything that would have caused or contributed to Charles Curry sexually abusing Anissa Barbina prior to September 17, 1998. Appellants do

claim that their pleadings filed in May of 2002 were sufficient to meet the last sentence quoted above from *Arbaugh*.

West Virginia Code, § 49-6A-2 provides as follows:

**When any medical, dental or mental health professional, christian science practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, emergency medical services personnel, peace officer or law-enforcement official, member of the clergy, circuit court judge, family law master, employee of the division of juvenile services or magistrate has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately, and not more than forty-eight hours after suspecting this abuse, report the circumstances or cause a report to be made to the state department of human services:** Provided, That in any case where the reporter believes that the child suffered serious physical abuse or sexual abuse or sexual assault, the reporter shall also immediately report, or cause a report to be made, to the division of public safety and any law-enforcement agency having jurisdiction to investigate the complaint: Provided, however, That any person required to report under this article who is a member of the staff of a public or private institution, school, facility or agency shall immediately notify the person in charge of such institution, school, facility or agency, or a designated agent thereof, who shall report or cause a report to be made. However, nothing in this article is intended to prevent individuals from reporting on their own behalf.

In addition to those persons and officials specifically required to report situations involving suspected abuse or neglect of children, any other person may make a report if such person has reasonable cause to suspect that a child has been abused or neglected in a home or institution or observes the child being subjected to conditions or circumstances that would reasonably result in abuse or neglect. (Bold face added).

Appellants in their reply to the WVDHHR discussed the high costs to a child sexual abuse victim and society, which is incorporated herein by reference. Because of those high costs, for humanitarian reasons, and because of a history of not addressing child abuse<sup>1</sup>, the West Virginia Legislature in 1965 and 1977 enacted West Virginia Code 49-6A-1, et seq.

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<sup>1</sup> See Exhibit 1 attached hereto and incorporated herein by reference.

West Virginia Code, § 49-6A-1 provides as follows:

**It is the purpose of this article, through the complete reporting of child abuse and neglect, to protect the best interests of the child, to offer protective services in order to prevent any further harm to the child or any other children living in the home, to stabilize the home environment, to preserve family life whenever possible and to encourage cooperation among the states in dealing with the problems of child abuse and neglect.**  
(Bold face added).

West Virginia Code, § 49-6A-10 provides as follows:

Within available funding and as appropriate, the state department shall conduct educational programs with the staff of the state department, persons required to report, and the general public **in order to encourage maximum reporting of child abuse and neglect**, and to improve communication, cooperation and coordination among all agencies involved in the identification, prevention and treatment of the abuse and neglect of children.

The West Virginia Legislature saw the need to intervene with child abuse and neglect cases.

A children is born very dependent on those caring for him or her for their very survival. A child to learn to love or fear or trust. Actions speak louder than words and the actions taken with regard to a child will usually determine about all phases of their outcomes and how they behave towards their child(ren). According to the statistics on pages 2 and 3 of Exhibit 1 attached hereto, 80% of the maltreatment comes from parents and 76% of the sexual abuse perpetrators were friends or neighbors. Though it did not add up in the undersigned's mind, 30% were other relatives. The very people that are closest to the child are the ones most likely to do them wrong; not so much strangers to the child. Why this is important is because the mandatory reporters under West Virginia Code, § 49-6A-2 occupy a unique role in being able to acquire evidence, since there is no other likely outlet for the wrongly treated child from the child's standpoint (and the child does not even have to realize that the mandatory reporter has suspected

maltreatment).

In the case at bar, there is no question that Anissa Barbina reported the sexual abuse to Helen Jean Lough at Valley, who believed Anissa Barbina, and who marked down that she made a CPS referral after having a meeting with her supervisors on September 18, 1998. Anissa Barbina apparently had not reported her sexual abuse to her mother, which may be because she sensed her mother would side with her mother's father, which her mother did (and only took her to two counseling sessions). Anissa Barbina in her first session with her therapist made the disclosure. Anissa Barbina took a chance that the wrong would be corrected. Anissa Barbina clammed up and did not tell her dad until he was clued in from his daughter's body's reactions that gave him the clue to her secret, which he then questioned her on.

However, while there is no question of Anissa Barbina reporting the incident to a mandatory reporter, there is a question as to whether the CPS referral was made, as WVDHHR denies receiving it. Regardless of that factual dispute, there is no question that West Virginia Code, § 49-6A-2 also required Helen Jean Lough to report the incident to "... the division of public safety and any law-enforcement agency having jurisdiction to investigate the complaint. . . ." Sgt. Ferguson, who headed the W.Va. State Police in Taylor County did not find out about the case until it was reported to him by John Barbina, who did not find out about the sexual abuse until February 6, 2000<sup>2</sup>. Valley has never sought to rebut this. The Taylor County Sheriff's

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<sup>2</sup> See John Barbina's counter affidavit paragraphs 3, 10, and 12 (which are out of order), which read as follows:

3. On February 6, 2000, Anissa Barbina was the first person to report to me that Charles Curry had sexually abused her;

...

10. Terri Tichenor, John Barbina's domestic lawyer, complained to Lori Glover about nothing being done. John Barbina had enough and reported the

Department denied they received a report of Anissa Barbina being sexually abused prior to February of 2000. Charles Curry lived outside of any municipality. According to page 2 of Exhibit 1, greater than one half of the child maltreatment reports come from what are the mandatory reporters under West Virginia Code, § 49-6A-2 and 43.2% of the reports are from friends, neighbors, and relatives. Page 2 of Exhibit 1 says the maltreatment of children is a national emergency. The evolution of the law for protecting children commences on page 4 of Exhibit 1. According to 1.14 of the "Court's Charge and Instructions, Civil Cases" (<http://www.state.wv.us/wvsca/jury/civilchg.htm>),

Negligence is the failure to exercise ordinary care, and ordinary care is that kind and degree of care or caution which an ordinary prudent and careful person would exercise under the same or similar circumstances.

Negligence is doing something a reasonably prudent person would not do in the same or similar circumstances, or the failing or refusing to do something a reasonably prudent persons would have done in the same, or similar circumstance. Negligence cannot be presumed, but must be proven.

What is negligent changes over time and is constantly evolving (e.g., seat belts, bicycle helmets, ski helmets). The undersigned can envision that given the factual dispute as to whether Valley made a CPS referral and the un-rebutted affidavit that Valley failed to notify at least the division of public safety (i.e., W.Va. State Police) that a jury could reasonably conclude that Valley was

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case with his present wife to the Division of Public Safety. They obtained a confession from Charles Curry that led to the entry of his guilty plea to two counts of sexual abuse of a child, who was Anissa Barbina.

...

13. John Barbina reported the sexual abuse to Sgt. Paul Ferguson of the Division of Public Safety, who looked for information concerning the incident, which had not been previously reported the sexual abuse of Anissa Barbina, and he commenced an investigation.



negligent.

Appellants have maintained to the trial court and this Court before and after *Arbaugh* that they have a cause of action under West Virginia law against mandatory reporters. Appellants realized while preparing a brief for *Arbaugh* that nearly all other jurisdictions have ruled that the mandatory reporting statute did not give rise to a civil action against mandatory reporters, but believed West Virginia Code §, 55-7-9 should weigh resolve such in the appellants favor. Appellants' counsel saw that this Court when faced with contributory negligence needing to be disposed of, and no action was being taken by the Legislature, brought comparative negligence into being with Syllabus Point 3, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979). Appellants' counsel saw the Worker's Compensation intentional injury statute broadened to protect workers with *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978). Appellants' counsel does not agree a correct decision was made in *Arbaugh*, which should be reversed, and now more strongly believes such because West Virginia Code §, 55-7-9 existed when West Virginia Code, § 49-6A-2 was enacted, because the Legislature could have specifically provided civil immunity, which it did not, and from a practical view because civil liability, rather than a minor criminal penalty (up to 10 days in jail and/or \$100.00 fine), which the undersigned has not seen enforced, civil liability would probably increase the mandatory reporting compliance, as plaintiffs' lawyers are more likely to do something than prosecutors, perpetrators would more likely be caught, and the costs to potential victims and costs to society would be reduced. If what the undersigned has seen in one of the smallest counties of the state in terms of population is any indication of the extent of abuse and neglect towards children, then there is a national emergency that requires teeth towards the most likely

people who could bring more of it to light, the mandatory reporters. The Legislature has stated the purpose of West Virginia Code, § 49-6A-1, which continued to West Virginia Code, § 49-6A-10.

While the undersigned realizes the chances of *Arbaugh* being reversed is probably slim at best (though hope still exists), the Court in the end recognized a negligence case can be maintained, contrary to Valley's assertion that there is no recognized cause of action in West Virginia. What unreported sexual abuse of a child is not egregious? While the undersigned does not believe any sexual abuse of an infant is not egregious, that is the present standard under *Arbaugh*. Whether or not the failure to report Charles Curry for touching Anissa Barbina's genitals and dragging his penis across her is egregious, is a jury issue under Article 3, § 10, of the West Virginia Constitution, which provides as follows:

No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

This is similarly provided in the Fifth and Fourteenth Amendments to the United States Constitution. A summary judgment on duty was inappropriate.

Appellants have discussed the causal connection to damages in other reply briefs. So the same is not considered waived as to Valley, the same will be said again.

Valley not allegedly making a CPS referral and "un-rebuttedly" not making a report to ". . . the division of public safety and any law-enforcement agency having jurisdiction to investigate the complaint. . . ." delayed Charles Curry from being arrested from September 18, 1998, to the spring of 2001.

This Court stated in *Brandon Lee, In Re*: H.S. 32872 (030106 Berkeley County):

Numerous statutes evidence the paramount importance that we attach to protecting and safeguarding this state's children from abusive and neglectful environs.

Again, the Good Samaritan story provides two types of wrongs. Those of commission by the robbers and thieves; those of omission by the priest and Levite who walked on by to let the victim continue hurting with untreated wounds that might not properly heal without intervention. Here, Valley did not do its duties. Doing nothing on Anissa Barbina's and letting her case slide through the cracks is an error of omission that is "... manifestly outside the scope of employment or official responsibilities." They were put in a special job to protect special kids, like Anissa Barbina. They damaged the kids they were to care for. Sharon Corley said it was a significant amount of time that went by.

The person of Anissa Barbina is comprised of her body, mind, and spirit (with the latter based on the faith of most people). Mental damages includes fear, which is the core of most people's neurosis(es). The father and custodian of Anissa Barbina had in his counter-affidavit that:

12. Anissa Barbina was damaged a little more with each day that she did not receive counseling and with each day she knew that Charles Curry remained free to possibly strike again.

and he provided graphic evidence to support what raised his initial concerns that his daughter was a sexual abuse victim at page 37 of his deposition:

7        A. I just remember just basically, in

8 thinking back on some of the bedwetting and the  
9 soiling of the pants and some of the other things that  
10 I witnessed in the past, I just pretty much went  
11 straight for the something sexual thing, I just went  
12 ahead and straight-out asked her.

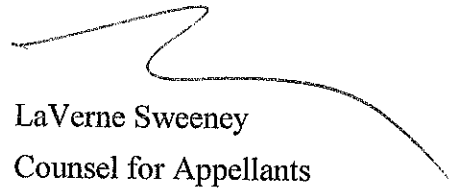
Appellants provided extensive testimony from the deposition of Helen Jean Lough to show the damages that sexual abuse victims, such as Anissa Barbina, can have (which was referenced in footnote 3 of the reply brief to WVDHHR). A fair reading of what John Barbina had to say in conjunction with what Helen Jean Lough, who is/was a therapist for Valley supports a clear inference that Anissa Barbina was damaged. Appellant was not given the benefit of that inference by the trial court. Appellants brought these to the attention of the trial judge in counter-affidavits to the summary judgment motions. Damages were sufficiently established to avoid a summary judgment.

For a judge to say she is not mentally damaged steals her constitutional due process rights and jury trial rights for her deprivation of a life free of her mental damage from the sexual abuse and battery. For a judge to say she is not mentally damaged steals her constitutional due process rights and jury trial rights for her deprivation of her liberty to obtain whatever employment she might have been able to pursue without the layer of mental damage from the sexual abuse and battery that can impair her ability to strive in school to achieve the fundamentals necessary for certain jobs and can impair the development of social skills for properly interacting at her place of employment.

RELIEF PRAYED FOR

Appellants prays that this Honorable Court reverse the decision of Taylor County concerning awarding summary judgment to Valley.

Respectfully Submitted,



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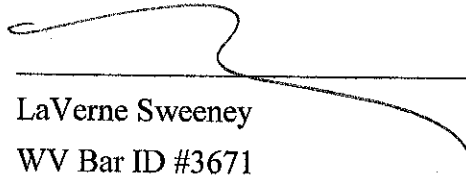
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served on each of the attorneys of record of all parties to the above-styled cause by enclosing the same in an envelope addressed to each such attorney and/or party, if a party has filed pleadings and is not represented by counsel, at his or her respective address as disclosed by the pleadings a record herein and set forth below, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Grafton, West Virginia, on the 19<sup>th</sup> day of September, 2006, as set forth below:



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